

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 621(a)(1) of)	
The Cable Communications Policy Act)	MB Docket No. 05-311
of 1934 as amended by the Cable Television)	
Consumer Protection and Competition Act)	
of 1992)	

COMMENTS OF ALCATEL

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SUMMARY

As a market leader in the provision of broadband and video equipment, Alcatel is well aware that the vast numbers of local franchises and their widely varying requirements have the potential to derail the next generation of broadband and competitive video services. The Commission has the authority to interpret Section 621(a) and, as required by Section 706, should do so in a manner that encourages deployment of these advanced services.

The United States has a clear national policy of promoting broadband. The Commission acknowledged in the *Notice* that the ability to deploy broadband and the ability to offer video services are interrelated. The enormous costs of deploying broadband and increased competition in the voice and data markets require that telecommunications carriers be able to offer a “triple play” of services, including voice, data and video, to earn sufficient revenue to justify upgrading and expanding their broadband networks. These improved networks will benefit the public through greater upstream and downstream speeds than obtainable today and new and better video offerings than those currently available.

Because broadband and video deployment are interrelated, a franchising authority’s “unreasonable” refusal to award a competitive franchise also impedes broadband deployment. Accordingly, the Commission should presume that franchise requirements consistent with the express authorizations granted by Section 621 are reasonable. Conversely, franchise requirements that exceed the authorizations granted by Section 621 – including excessive time to grant or deny an application; ancillary obligations unrelated to competitive video entry; unjustified network modifications unrelated to delivery of competitive video services; build-out requirements; and level-playing-field statutes that do not allow for streamlined competitive entry

and/or mandate terms and conditions reserved for incumbents – constitute unreasonable refusals to grant a competitive franchise.

The Commission has ample authority to interpret Section 621(a) in this manner. Congress has charged the Commission with adopting rules to implement the Communications Act, including Title VI. Courts have specifically rejected claims that the Commission lacked the authority to interpret Section 621 and have found that the FCC's interpretations should be afforded substantial deference. Section 706 must also inform the Commission's interpretation of Section 621. As the FCC has recognized in other proceedings, this legislative directive mandates that the Commission use its authority in a manner that encourages the deployment of advanced services. Further, the Commission's ancillary authority under Title I complements its Title VI authority and allows the Commission to implement Congress's goal of promoting video competition by preventing unreasonable barriers to entry.

Finally, as the *Notice* acknowledges, the Commission can preempt any state or local law that is tantamount to an unreasonable refusal to grant a competitive franchise. Section 636 expressly preempts any state provision that is inconsistent with the statute. The Commission can also preempt state and local regulations that conflict with the accomplishment of federal objectives, including the promotion of video competition and broadband investment.

Applying burdensome and unnecessary regulation to new entrants frustrates competitive entry. The Commission should therefore use its broad authority to ensure that local franchise regulation does not impede the deployment of broadband services and video competition.

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Alcatel hereby respectfully submits its Comments on the Notice of Proposed Rulemaking in the above-captioned docket.¹ Communications laws and policies that unnecessarily cause delay or increase the cost of deployment will adversely affect investment, and the equipment vendor community, including Alcatel, is directly impacted by this environment. Alcatel is a principal provider of voice, video, and data service solutions and equipment in over 130 countries. In the digital subscriber line (“DSL”) market, Alcatel has shipped more than 74 million lines worldwide,² with an estimated 38 percent of the global DSL market and an over 60 percent market share in North America. In addition, Alcatel, through its global collaboration agreement with Microsoft,³ is developing an integrated Internet Protocol Television (“IPTV”) delivery solution for broadband service providers that will enhance video applications, integrate content and digital rights management, and manage the quality of services through intelligent

¹ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 20 FCC Rcd. 18581 (2005) (“Notice”).

² Press Release, Alcatel, China Telecom Selects Alcatel to Upgrade DSL Network for Triple Play Service Delivery (Feb. 6, 2006), *available at* <http://home.alcatel.com/vpr/vpr.nsf/DateKey/06022006uk>.

³ Press Release, Alcatel, Alcatel and Microsoft Create an Industry-Leading Solution for IP Television (Feb. 22, 2005), *available at* <http://www.alcatel.com>.

video packet handling. AT&T has selected Alcatel as its sole network infrastructure supplier and video integrator in Project Lightspeed to bring IPTV to 18 million homes by mid-2008.

The Commission has asked for comment on how it should implement Section 621(a)(1) to ensure that the franchising process does not impede “interrelated federal goals of enhanced cable competition and accelerated broadband deployment.”⁴ Promotion of advanced services is critical for the U.S. economy and is a national priority. As a leading provider of both digital subscriber line equipment and of satellite, terrestrial wireless, and wireline systems for video services, Alcatel knows first-hand that the franchising process could frustrate deployment of advanced services.

Just as communications policy lowered the barriers to entry for broadband providers and competitive local exchange carriers (“CLECs”) in the local telecommunications market, nondominant carriers in the interexchange market, and CMRS providers, the Commission should employ all of its statutory tools to streamline entry of competitive wireline video providers. The local video franchise process, because of the large number of jurisdictions and their inconsistent requirements, is a barrier to widespread video competition and deployment of the next generation of broadband networks and could compromise the Commission’s exclusive jurisdiction over information services and interstate telecommunications services. The Commission has the authority to interpret Section 621, and as required by Section 706, should do so in a manner that encourages more broadband deployment, cable competition, technological advancement and increased choice for consumers.

⁴ Notice, ¶ 1.

I. UNREASONABLE REFUSALS TO GRANT VIDEO FRANCHISES THREATEN BOTH INCREASED VIDEO COMPETITION AND FURTHER BROADBAND DEPLOYMENT.

A. Congress, the President, and the Commission Have Made Clear That Promotion of Broadband Is a National Priority.

The importance of broadband for both consumers and the economy is unquestioned. In Section 706(a) of the Act, Congress mandated that the Commission “encourage the deployment . . . of advanced telecommunications capability to all Americans,”⁵ recognizing the need “to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition.”⁶ The legislative history confirms that Congress intended to include video within its Section 706 directive: “[t]he goal [of Section 706] is to accelerate deployment of an advanced capability that will enable subscribers in all parts of the United States to send and receive information in all its forms – voice, data, graphics, and *video* – over a high-speed switched, interactive, broadband, transmission capability.”⁷ Congress has also emphasized the importance of promoting competition in the video market since the 1984 Cable Act.⁸ More recently, in amending the Cable Act in 1996, Congress “[r]ecognize[d] that there can be different strategies, services and technologies for entering video markets.”⁹¹⁰

⁵ See 47 U.S.C. § 157(a) nt.

⁶ H.R. Rep. No. 104-458, at 1 (1996) (Conf. Rep.).

⁷ S. Rep. No. 104-23, at 50-51 (1995) (emphasis added).

⁸ 47 U.S.C. § 521(6) (stating that an express purpose is to “promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems”).

⁹ H.R. Rep. No. 104-458, at 172.

¹⁰ 47 U.S.C. § 571(a)(2)-(4).

Similarly, President George W. Bush's Broadband Initiative creates a "national goal for . . . the spread of broadband technology" with the objective of achieving "universal, affordable access for broadband technology by the year 2007, and then we ought to make sure as soon as possible thereafter, consumers have got plenty of choices when it comes to [their] broadband carrier."¹¹ To this end, President Bush supports removing unnecessary regulatory barriers – such as "unreasonabl[e]" refusals for competitive cable entry where cable franchises are required – explaining that "[d]eregulating new ultra-fast broadband infrastructure to the home removes a significant barrier to new capital investments."¹²

The Commission and Chairman Kevin J. Martin likewise acknowledge the importance of broadband deployment. In its recent order, the Commission deregulated certain broadband offerings to encourage "facilities-based wireline broadband Internet access service providers to respond to changing marketplace demands effectively and efficiently, spurring them to invest in and deploy innovative broadband capabilities that can benefit all Americans."¹³ Chairman Martin has made "[c]reating a policy environment that speeds the deployment of broadband throughout the U.S. [his] highest priority as the new chairman of the FCC,"¹⁴ while recognizing

¹¹ President's Remarks in Albuquerque, New Mexico, 40 Weekly Comp. Pres. Doc. 13, at 484 (Mar. 28, 2004).

¹² The White House, "A New Generation of American Innovation" at 11 (Apr. 2004), available at http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html.

¹³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, 14855, ¶ 1 (2005) ("Wireline Broadband Order").

¹⁴ Kevin Martin, *Broadband*, Wall St. J., July 7, 2005, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-259927A1.doc.

that although there have been “billions of dollars of new investment in broadband networks, there is still more that the government must do to spur broadband deployment.”¹⁵

B. The Commission Should Encourage Competitive Video Entry To Spur Further Broadband Deployment, Competition, and Economic Development.

The Commission has acknowledged that carriers’ ability “to offer video to consumers and to deploy broadband networks rapidly are linked intrinsically”¹⁶ and that the “federal goals of enhanced cable competition and rapid broadband deployment” are “interrelated.”¹⁷ The Commission is well aware of the price and quality benefits of wire-based and satellite-based competition.¹⁸ The costs of building out and upgrading these competitive wireline broadband networks are enormous. Further, competition in both the voice and data markets is intense. As of the end of the second quarter of 2005, cable television operators provided voice service to 4.4 million residential customers.¹⁹ “[C]able’s advanced services are available to more than 103 million homes, or 93 percent of U.S. households passed by cable,”²⁰ giving the cable industry 56 percent of the broadband access market.²¹ While consumers have realized significant benefits

¹⁵ *Id.*

¹⁶ *Notice*, ¶ 1.

¹⁷ *Id.* ¶ 11.

¹⁸ United States General Accounting Office, “Issues Related to Competition and Subscriber Rates in the Cable Television Industry,” GAO-04-8, Oct. 24, 2003, *available at* www.gao.gov/new.items/d048.pdf.

¹⁹ *See* NCTA, “Industry Overview: Residential Telephony Customers 2003-2005,” <http://www.ncta.com/Docs/PageContent.cfm?pageID=311> (last visited Feb. 8, 2006).

²⁰ *See* NCTA, “2005 Mid-Year Industry Overview” at 8, *available at* http://www.ncta.com/industry_overview/CableMid-YearOverview05FINAL.pdf.

²¹ FCC, Industry Analysis and Technology Division, “High-Speed Services for Internet Access: Status as of December 31, 2004,” at Table 1, Chart 2 (rel. July 7, 2005), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0705.pdf.

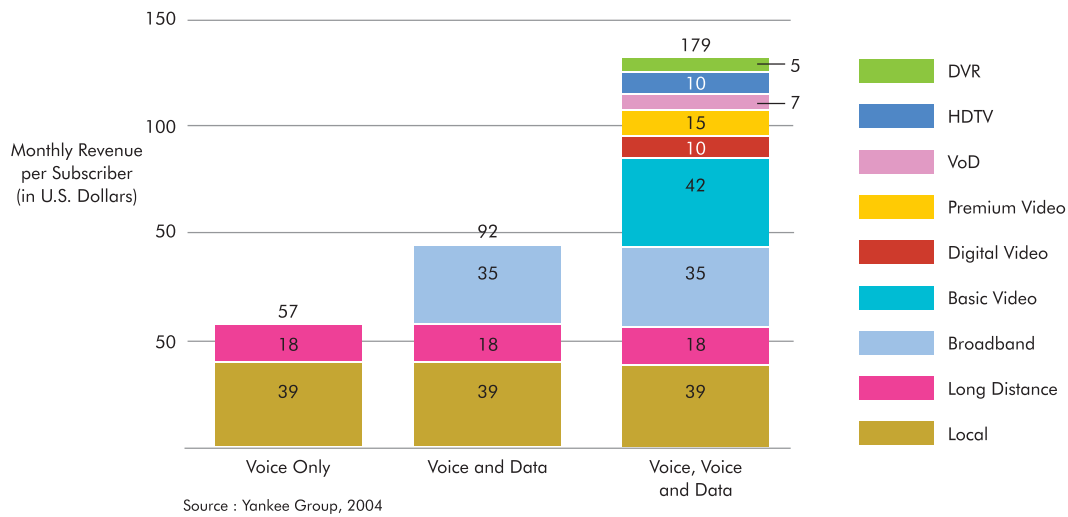
from this competition, most notably through price decreases,²² such competition, and the related price decreases, are lacking in the wireline video market.²³

Providing a “triple play” offering including video services is critical for telecommunications carriers to earn sufficient revenue to justify upgrading and expanding their broadband networks. However, the next generation of broadband networks, whether based on a DSL, fiber, or wireless technology, will go unrealized unless the service provider can demonstrate to its shareholders and creditors that the revenue expectation justifies the expenditure. A viable video offering is critical to the revenue expectation needed to justify this investment. Texas provides an example of how deregulation of competitive entry into the video market will directly result in an expansion of broadband availability.²⁴ The following chart illustrates the monthly revenue per subscriber based on a variety of triple-play services.

²² Comcast now offers a \$19.99/month cable modem service. See Comcast, “Comcast High-Speed Internet Now Only \$19.99/Month!,” <http://www.comcastoffers.com/search/?cid=51993&affid=dsl> (last visited Feb. 8, 2006). Verizon’s basic DSL starts at \$14.95/month. See Verizon, <http://www22.verizon.com/> (last visited Feb. 8, 2006). AT&T offers a \$12.99 service. See *AT&T Lowballs DSL at \$12.99*, TelecomWeb, Feb. 8, 2006, www.telecomweb.com/news/1138994774.htm.

²³ “Major cable operators, however, aren’t increasing prices for their high-speed Internet and phone services — in part due to competition from phone companies and the desire to build those businesses.” *Major Cable Companies Raising Rates*, Associated Press, Dec. 2, 2005, www.msnbc.msn.com/id/10295748/.

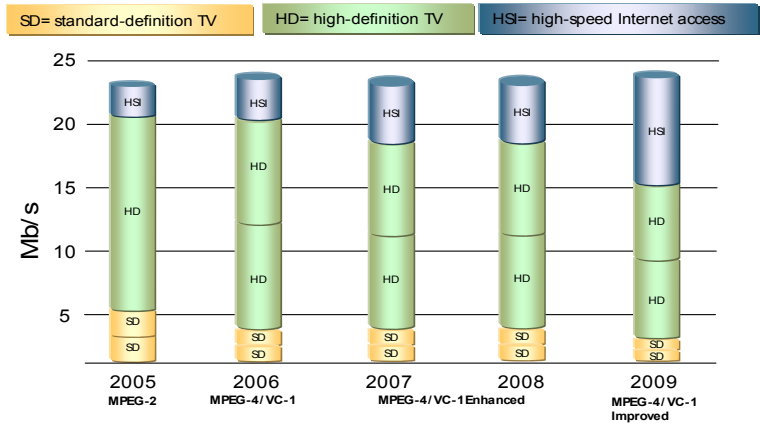
²⁴ In Texas, AT&T will roll out broadband technology to all of its switching centers, providing the vast majority of its customers with access to DSL and IPTV, which translates into 228 additional urban and suburban neighborhoods (72 additional switching centers) having DSL service. See Sanford Nowlin, *SBC Plans \$800 Million for TV, DSL*, San Antonio Express-News, Nov. 18, 2005, at Business Page 01C.



These next-generation networks will also provide new capabilities. AT&T's Project Lightspeed will rely primarily on a Fiber to the Node architecture in which the copper subloops are no longer than 3,000 - 5,000 feet. At this distance, ADSL2+, ADSL 2+ Bonded, and VDSL technologies can provide the 22-25 Mbps necessary to offer consumers multiple high definition and standard definition channels along with voice and high speed Internet access. The following demonstrates the mix of services available to service providers that employ data compression and these advanced DSL technologies.

Network Challenges: Bandwidth Needed for Triple Play

- Service mix may vary, for example, voice over IP (VoIP) or service subsets may be offered
- Second HD channel Initially to support concurrent home PVR recording
- Assumes quality of picture competitive with digital satellite/ cable



MPEG-2 SD	MPEG-2 HD	MPEG-4/VC-1 SD	MPEG-4/VC-1 HD	MPEG-4/VC-1 enhanced SD	MPEG-4/VC-1 enhanced HD	MPEG-4/VC-1 improved SD	MPEG-4/VC-1 improved HD
2.5 Mb to 3 Mb	15 Mb to 19 Mb	1.5 Mb to 2 Mb	10 Mb to 12 Mb	Less than 2 Mb	8 Mb to 10 Mb	Less than 1 Mb	Less than 7 Mb



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Deployment of these improved broadband networks also leads to economic investment and growth. For example, as of November 2005, Alcatel has already invested \$50 million in the United States in support of its IPTV business. Alcatel has 9,000 employees in North America and devotes more than 20 percent of its North American revenue to research and development (“R&D”). Alcatel’s global R&D centers for IP routing and enterprise applications are based in California, its IPTV integration is focused primarily in Texas, and its North Carolina-based Access Network Division is responsible for the DSL and fiber-based infrastructure on which these services rely.

Promoting video entry, therefore, not only encourages the deployment of broadband generally, but also results in more competition and economic benefits.

C. The Commission Should Interpret Section 621's Unreasonable Refusal Language in a Manner That Facilitates Competitive Video Entry.

Given the interrelated nature of video and broadband, any barriers to competitive video entry also unnecessarily hinder further broadband deployment. Section 621(a)(1) provides that “[a] franchising authority . . . may not unreasonably refuse to award an additional competitive franchise.”²⁵ The Commission should use its authority to ensure that franchise requirements do not stand in the way of competitive entry.

There are an estimated 30,000 local franchise authorities (“LFAs”) in the United States,²⁶ each with its own processes, timelines, and requirements. Under the best of circumstances, obtaining enough local franchises to support a reasonable business plan is a daunting proposition that can be expected to take years. For example, although Verizon has been attempting to negotiate franchises in communities throughout its service area for more than one year, it has only obtained 50 franchises.²⁷ If the local franchising process is used to impose unreasonable requirements on potential video providers, it could significantly delay or restrict service by wireline telecommunications carriers and other entrants.

As the Commission tentatively concluded, franchise requirements that are consistent with the statutory criteria in Title VI are reasonable.²⁸ Conversely, requirements going beyond the statute are unreasonable and in violation of Section 621(a). Moreover, the Commission has noted correctly that more subtle forms of refusal, such as unreasonable delays and regulatory

²⁵ 47 U.S.C. § 541(a)(1).

²⁶ United States General Accounting Office, “The Effect of Competition from Satellite Providers on Cable Rates,” RCED-00-164, July 18, 2000, at 36, Table 6, *available at* www.gao.gov/archive/2000/rc00164.pdf.

²⁷ “Verizon Urges House to Split Franchising from Telecom Bill,” *Comm. Daily*, Vol. 26, No. 19, Jan. 30, 2006, at 2.

²⁸ *Notice*, ¶ 20.

roadblocks, should also be found to be unreasonable.²⁹ Franchise demands that are not consistent with Section 621(a)(1) and should be deemed unreasonable under Section 621 include, but are not limited to:

- *Excessive time to grant or deny an application.* If a local franchise authority fails to grant or deny an application for a competitive franchise, the potential provider has no recourse. In the *Notice*, the Commission points out that Section 617 of the Communications Act limits franchise authority review of sales or transfers of cable franchises to 120 days.³⁰ While 120 days would represent a vast improvement over the current process, which often can take much longer, the Commission should consider the Texas standard of 17 business days from receipt of an application to grant of the certificate to a provider of competitive video services.³¹
- *Ancillary obligations unrelated to competitive video entry, such as redundant institutional networks (“INET”) and video studios.* Demands that a competitive provider build additional INETs and video studios when the existing facilities already are sufficient to meet public needs is both wasteful and unreasonable.
- *Unjustified network modifications unrelated to delivery of competitive video services.* An LFA requirement that a competitive video provider modify its network in ways that have no bearing on the provision of its video services has no basis in Title VI and is unreasonable.
- *Build-out requirements.* Build-out requirements for competitive entrants should be eliminated. Just as competitive local exchange carriers and other nondominant providers are

²⁹ *Id.* ¶ 19.

³⁰ *Id.* ¶ 21 & n.80.

³¹ State-Issued Cable and Video Franchise, Tex. Util. Code Ann. §§ 66.001-66.017.

allowed to enter and serve the market based on commercial decisions, competitive wireline video providers should be free to enter based on market considerations. Alternatively, if competitive video providers must agree to build-out requirements, the Commission should hold that it is unreasonable for the local franchise authority not to allow flexible technological solutions to achieve this obligation. A competitive video provider may use technology different from that used by incumbent cable providers. In some cases, the predominant architecture may not feasibly serve all customers. Applicants should be allowed to use alternative technologies, such as wireless or a satellite/DSL mix, to meet their build-out requirements. Title VI does not give franchise authorities the right to force applicants to serve all customers using the same technology, and any attempt to do so is unreasonable.

- *Level-playing-field statutes that do not allow for streamlined competitive entry and/or mandate terms and conditions reserved for incumbents.* Congress, the Commission, and the states have all recognized that certain obligations applicable to incumbent providers are unnecessary for new entrants and would only frustrate competition. For example, cable providers entering the market as CLECs were given, among other lightened regulatory requirements: treatment as nondominant carriers under Section 201; reduced Section 203 tariffing requirements; exemption from the Commission's accounting rules; less burdensome interconnection obligations under Section 251; exemption from ARMIS reporting requirements; and exemption from carrier-of-last-resort obligations, which are the equivalent of build-out requirements for incumbent local exchange carriers. Application of unnecessary regulation to a competitive provider because of a level-playing-field requirement is not consistent with Title VI and is unreasonable.

These and all other unreasonable requirements stand in the way of further broadband deployment and video competition, and the Commission should make clear that they are inconsistent with, and barred by, Section 621.

II. THE COMMISSION HAS THE AUTHORITY TO INTERPRET WHAT CONSTITUTES AN “UNREASONABLE REFUSAL” UNDER SECTION 621.

In the *Notice*, the Commission “tentatively conclude[s]” that it “has authority to implement Section 621(a)(1)’s directive that LFAs not unreasonably refuse to award competitive franchises.”³² In addition, the Commission found that, “under Sections 621(a) and 636(c) of the Act, and under the Supremacy Clause of the U.S. Constitution, the Commission may deem to be preempted and superceded any law or regulation of a State or LFA that causes an unreasonable refusal to award a competitive franchise in contravention of section 621(a).”³³ The *Notice* seeks comment on these tentative conclusions,³⁴ and also asks interested parties to comment on “possible sources of Commission authority, other than Section 621(a)(1), to address problems caused by the local franchising process.”³⁵ The Commission’s tentative conclusions are correct, as the Commission certainly has the authority to interpret Section 621(a)(1) and preempt local franchising authorities’ rules and regulations that are tantamount to an unreasonable refusal.

³² *Notice*, ¶ 15.

³³ *Id.* The Commission also “tentatively conclude[s] that Section 621(a)(1) authorizes the Commission to take actions . . . to ensure that the local franchising process does not undermine the well-established policy goal of increased MVPD competition and, in particular, greater cable competition within a given franchise territory.” *Id.* ¶ 17. In addition, the Commission found that “the 1992 Cable Act’s revisions to Section 621(a)(1) indicate that Congress considered the goal of greater cable competition to be sufficiently important to justify the Commission’s adoption of rules.” *Id.* ¶ 15.

³⁴ *Id.* ¶ 15.

³⁵ *Id.* ¶ 18.

A. Congress Provided the Commission with Authority To Implement and Interpret the Communications Act, Including the Cable Act.

In the Communications Act, “Congress has delegated to the Commission . . . the authority to promulgate binding legal rules.”³⁶ This delegation applies equally to regulation of the cable industry, as set forth in Title VI of the Communications Act.³⁷ Indeed, the Commission’s interpretations typically are reviewed under the deferential *Chevron* standard, and appellate courts have upheld the Commission’s interpretations of Section 621’s “general franchise requirements” on three separate occasions.³⁸

In *City of Chicago*, for example, the Commission found that an operator of a satellite master antenna television system was not a “cable operator” of a “cable system” and therefore did not need to obtain a franchise pursuant to Section 621 from the local franchising authority prior to offering service.³⁹ Parties appealed the Commission’s decision and argued that the Commission lacked authority to interpret Section 621 (codified as 47 U.S.C. § 541). The Seventh Circuit flatly rejected this claim, finding that “[w]e are not convinced that . . . the FCC has well-accepted authority under the Act but lacks authority to interpret [47 U.S.C.] § 541 and to determine what systems are exempt from franchising requirements.”⁴⁰ This precedent

³⁶ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005); *see also Cellular Mobile Sys., Inc. v. FCC*, 782 F.2d 182, 197 (D.C. Cir. 1985) (“The Supreme Court has previously observed that the Communications Act is a ‘supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.’” (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940))).

³⁷ *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999) (citing *Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1995)); *see also Am. Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1178 (D.C. Cir. 1995).

³⁸ *See City of Chicago*, 199 F.3d 424; *Nat’l Cable Television Ass’n v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994); *ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987).

³⁹ *City of Chicago*, 199 F.3d 424.

⁴⁰ *Id.* at 428 (citing *Nat’l Cable Television Ass’n*, 33 F.3d at 70). As noted previously, Section 621 of the Cable Act is codified as 47 U.S.C. § 541.

conclusively demonstrates that Congress “charged” the Commission with interpreting the Cable Act,⁴¹ including Section 621’s unreasonable refusal, and that the Commission’s interpretation will be afforded “substantial deference.”⁴²

The fact that LFAs will apply the FCC’s interpretation of “unreasonable” and that aggrieved parties can obtain relief from courts does not alter the Commission’s legal authority to interpret a statutory provision that it is charged with administering. In an analogous context, the Commission has interpreted and established a standard for states to apply in determining the price of unbundled network elements in Section 252(d)(1) of the Communications Act. The Commission did so even though Congress expressly delegated the authority to set rates to state commissions. On appeal, parties challenged the Commission’s legal authority to adopt such a pricing standard. The Supreme Court upheld the Commission’s authority to establish the pricing standard for states to apply.⁴³ Whereas Section 252(d)(1) expressly delegates the determination of just and reasonable rates to state commissions – not the FCC – Section 621 is *not* a delegation of authority to states, but in fact a *limitation* on the states’ authority. The Commission is tasked with overseeing Section 621 to ensure the existence of “a national policy concerning cable communications” and to “minimize unnecessary regulation that would impose an undue

⁴¹ *Id.* (citing *Time Warner Cable*, 66 F.3d 867).

⁴² *Nat’l Cable Television Ass’n*, 33 F.3d at 70. In addition to upholding the Commission orders interpreting Section 621, courts also have affirmed the agency’s authority to interpret other provisions of the Cable Act and Title VI. *See, e.g., City of New York v. FCC*, 486 U.S. 57 (1988) (affirming the Commission’s order adopting technical standards for cable television channels and preempting local franchising authorities under Section 624, 47 U.S.C. § 544); *Adelphia Commc’ns Corp. v. FCC*, 88 F.3d 1250, 1257-58 (D.C. Cir. 1996) (upholding Commission orders interpreting Section 623, 47 U.S.C. § 543); *Time Warner Entm’t Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995) (same).

⁴³ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

economic burden on cable systems.”⁴⁴ Thus, the Commission’s tentative conclusion that it has the authority to interpret Section 621 unquestionably is correct.

While the Commission’s authority is well-settled, should there nonetheless be any lingering ambiguity regarding the Commission’s authority to interpret Section 621, the Commission’s ancillary authority under Title I complements its Title VI authority and empowers the Commission to take actions “necessary” to execute its duties.⁴⁵ While section 4(i) is not a standalone basis of authority, the D.C. Circuit has recognized that it is “akin to a ‘necessary and proper’ clause” that empowers the Commission to take action that is “‘reasonably ancillary’ to other express provisions.”⁴⁶ In the *Notice*, the Commission highlighted Congress’s goal of promoting competition in amending the Cable Act to bar local franchising authorities from granting exclusive franchises and prevent LFAs from unreasonably refusing to grant additional franchises. To fulfill these federal objectives, the Commission may invoke its ancillary Title I authority in Sections 151, 152 and 154(i) to interpret Section 621.

B. Section 706 of the Act Compels the Commission To Interpret Section 621 in a Manner That Encourages Broadband Deployment.

In addition to the Commission’s authority under Title VI, Section 706(a) of the Act mandates that the Commission “encourage the deployment . . . of advanced telecommunications capability to all Americans.”⁴⁷ Congress defined advanced telecommunications capability

⁴⁴ See 47 U.S.C. § 521(1), (6); see also *City of New York*, 486 U.S. at 61 (highlighting Congress’s goal of creating a national policy for cable communications in the Cable Act).

⁴⁵ See 47 U.S.C. § 154(i).

⁴⁶ See *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (quoting Separate Statement of Comm’r Powell, Concurring in Part, Dissenting in Part, *Implementation of Video Description of Video Programming*, Report and Order, 15 FCC Rcd. 15230, 15276 (2000)). Section 4(i) of the Act empowers the Commission to enact rules and regulations that are “necessary” to execute its duties. See 47 U.S.C. § 154(i).

⁴⁷ See 47 U.S.C. § 157(a) nt.

“without regard to any transmission media or technology.”⁴⁸ The Commission has recognized the importance of Section 706 in shaping the Commission’s decisions and policies.⁴⁹ Courts likewise have upheld the Commission’s use of Section 706 as a complement to other sections of the Act.⁵⁰ Therefore, the Commission must ensure that its exercise of authority to interpret Section 621 is consistent with encouraging the deployment of broadband services.

C. The Commission Correctly Found That It Has the Authority To Preempt Any State and Local Law That Causes an Unreasonable Refusal.

The *Notice* properly concludes that the Commission has authority to preempt local franchising authorities’ actions that are tantamount to an unreasonable refusal.⁵¹ The Supremacy Clause of the United States Constitution mandates that “the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby”⁵²

⁴⁸ *Id.* § 157(c)(1) nt.

⁴⁹ See, e.g., *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order, 18 FCC Rcd. 16978, 1711, ¶ 213 (2003) (“With respect to unbundling obligations for facilities used to provide broadband service, we are charged with determining the potential impact of our rules on advanced services, including those supported by broadband deployment and infrastructure investment, as directed by section 706 of the 1996 Act. For this reason, we craft unbundling rules that provide the right incentives for all carriers, including incumbent LECs, to invest in broadband facilities. Thus, we decline to require unbundling on a national basis of the features, functions, and capabilities of the packetized fiber facilities of incumbent LEC hybrid loops.” (footnote omitted)); *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd. 15856, 15859-860, ¶ 7 (2004) (“It would be inconsistent with the Commission’s goal of promoting broadband deployment to the mass market to deny this substantial segment of the population the benefits of broadband by retaining the regulatory disincentives associated with unbundling.”); *Wireline Broadband Order*, 20 FCC Rcd. at 14856, ¶ 3 (“We are confident that the regulatory regime we adopt in this Order will promote the availability of competitive broadband Internet access services to consumers, via multiple platforms, while ensuring adequate incentives are in place to encourage the deployment and innovation of broadband platforms consistent with our obligations and mandates under the Act.”).

⁵⁰ See, e.g., *USTA v. FCC*, 359 F.3d 554, 580, 583 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004).

⁵¹ *Notice*, ¶ 15.

⁵² U.S. Const. art. VI, § 2; see also *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

Under the Supremacy Clause, the Supreme Court has recognized that preemption of state law is required in three circumstance: (1) where Congress expresses an intent to displace state law; (2) where Congress implies such an intent; and (3) where state law conflicts with federal law.⁵³

Here, the Commission has the authority to preempt conflicting state regulations for two independent reasons: (1) Congress expressly preempted state laws; and (2) inconsistent state regulations conflict with the federal regulations.

First, express preemption “is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”⁵⁴ In this case, Congress enacted Section 636 and explicitly preempted state regulations. In particular, Section 636 provides that “*any provision of law of any State, political subdivision, or agency thereof, or franchising authority, . . . which is inconsistent with this chapter shall be deemed to be preempted and superseded.*”⁵⁵ The First Circuit has held that the Section 636 preemption clause expressly preempts conflicting state and local cable regulations.⁵⁶

Second, in addition to the Congress’s express preemption of unlawful acts by LFAs, the Commission also has the authority to preempt state and local regulations that conflict with or stand as an obstacle to the accomplishment of federal objectives. Such a conflict arises when “compliance with both federal and state regulations is a physical impossibility,”⁵⁷ or when the

⁵³ *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990).

⁵⁴ *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

⁵⁵ See 47 U.S.C. § 556(c) (emphasis added). The one exception to this express preemption is not relevant here. See *id.* (“[e]xcept as provided in section 557 of this title”). That section applies to “existing franchises” and the instant proceeding focuses on the issuance of new competitive franchises.

⁵⁶ See *Liberty Cablevision, Inc. v. Municipality of Caguas*, 417 F.3d 216, 220 (1st Cir. 2005).

⁵⁷ *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

state law frustrates,⁵⁸ or “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁵⁹ In determining whether conflict preemption exists, “[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.”⁶⁰

Even before the enactment of express preemption in Section 636, the Supreme Court recognized the Commission’s authority to preempt inconsistent state cable regulations.⁶¹ A central goal of the federal Cable Act is to encourage competition in the market for cable and video services by eliminating barriers to entry and, in particular, to encourage entry by telecommunications providers. In the *Notice*, the Commission recognized the importance of taking action “to ensure that the local franchising process does not undermine the well-established policy goal of increased MVPD competition and, in particular, greater cable

⁵⁸ *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978); *Jones*, 430 U.S. at 525, 540-41; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁵⁹ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (preempting a state law which undermined intended purpose and “natural effect” of at least three provisions of the federal Act).

⁶⁰ *Free v. Bland*, 369 U.S. 663, 666 (1962); see also *Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981).

⁶¹ See *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984). Conflict preemption applies with equal force to federal regulations. See, e.g., *Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (“Federal regulations have no less pre-emptive effect than federal statutes.”); see also *State Corp. Comm’n of State of Kan. v. FCC*, 787 F.2d 1421, 1426 (10th Cir. 1986); *N.C. Utils. Comm’n v. FCC*, 552 F.2d 1036, 1046 (4th Cir. 1977) (“FCC regulations must preempt any contrary state regulations where the efficiency . . . of the national communications network is at stake . . .”).

competition within a given franchise territory.”⁶² Likewise, as noted *supra* in section I, there is a clear federal objective of encouraging rapid deployment of broadband services.

In this case, LFA actions and state regulations are delaying and acting as a barrier to competitive cable franchises, in violation of Section 621, and these actions and regulations plainly frustrate the federal objective of promoting competitive cable entry and encouraging broadband deployment.

III. CONCLUSION

In this proceeding, the Commission should exercise its broad authority to streamline competitive video entry and promote the deployment of the next generation of broadband facilities. Recently, the Commission created a well-balanced regulatory environment for broadband facilities and services and contributed to a robust deployment of competitive broadband services. Alcatel’s internal statistics show that the DSL net additions for major U.S. telephone carriers have increased 253% from the first quarter of 2003 through the third quarter of 2005. These statistics demonstrate that when the Commission creates a regulatory environment conducive to investment, as it did in the February 2003 Triennial Review Order, the market responds. The Commission should act similarly here to streamline the collection of unique and often onerous video franchise rules set at the local level. Such action will spur a similar, if not greater, level of investment in the next generation of broadband networks.

The regulatory obstacle of thousands of local video franchises potentially wielding their authority to adopt unreasonable requirements will invariably impede deployment by competitors and negatively impact investment in advanced technologies and services. Alcatel appreciates the

⁶² Notice, ¶ 17. The Commission also found that “the 1992 Cable Act’s revisions to Section 621(a)(1) indicate that Congress considered the goal of greater cable competition to be sufficiently important to justify the Commission’s adoption of rules.” *Id.* ¶ 15.

Commission's attention to this issue and its recognition that the video franchise process is not only an impediment to service providers but also a barrier to further broadband deployment and economic growth.

Respectfully submitted,

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